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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1963

No. 648

BRYAN CLEMMONS, WINGATE WHITE and JOHN CHRISTIAN,
The Latter in His Official Capacity as Mayor-President of the City of Baton Rouge, Louisiana,

Petitioners,

versus

CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Bryan Clemmons, Wingate White and John Christian, the latter in his official capacity as Mayor-President of the City of Baton Rouge, Louisiana, original plaintiffs herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Fifth Circuit, rendered September 12, 1963 (rehearing denied October 18, 1963).

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported in 323 F.2d at page 54, and is appended hereto as Appendix A. The opinion of the United States District Court for the Eastern District of Louisiana, rendered in favor of original plaintiffs and reversed and remanded by the judgment below, is reported in 201 F. Supp. at page 737, and is appended hereto as Appendix B.

STATEMENT OF JURISDICTION

(1) The Court has jurisdiction to consider and grant this petition pursuant to Title 28, United States Code, Section 1254.

(2) The date of the original opinion and judgment rendered below by the United States Court of Appeals for the Fifth Circuit was September 12, 1963. A copy of the judgment is appended hereto as Appendix C.

A petition for rehearing was filed on October 2, 1963, within the time provided by law and by the rules of the United States Court of Appeals for the Fifth Circuit. The petition for rehearing was denied October 18, 1963. A copy of the judgment of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing is appended hereto as Appendix D.

(3) Application for a stay of the mandate was filed on October 24, 1963, pursuant to and in accordance with the rules of the United States Court of Appeals for the Fifth Circuit.

On October 31, 1963, the United States Court of Appeals for the Fifth Circuit ordered that the issuance of the mandate be stayed for a period of thirty (30) days pending application to the Supreme Court of the United States for a writ of certiorari. A copy of the order of the United States Court of Appeals for the Fifth Circuit staying the issuance of the mandate is appended hereto as Appendix E. This petition is therefore filed within the time prescribed by Title 28, United States Code, Section 2101, and within the time prescribed by the order of the United States Court of Appeals, Fifth Circuit, staying the issuance of the mandate.

(4) Original jurisdiction in the District Court of the United States for the Eastern District of Louisiana was asserted under the provisions of Title 28, United States Code, Section 1343(1), and Title 42, United States Code, Section 1985(3).

THE QUESTIONS PRESENTED

Two questions are presented by this petition for writ of certiorari:

The first presents for review by this Court, the unusual procedural practice adopted by the United States Court of Appeals for the Fifth Circuit in this case, of supplying and considering, on its own motion, a motion to dismiss which had not been filed by the original defendants. Not only did the Court supply the motion to dismiss, but it disposed of it adversely to appellees, upon a legal issue which was neither raised, briefed, nor argued. It this regard, we believe that the decision below so far departs from the accepted and usual course of judicial proceedings as to bring this application

within the scope of those cases which call for an exercise of this Court's power of supervision.

Secondly, the Fifth Circuit Court of Appeals, in granting its own motion to dismiss, construed the provisions of 42 USCA 1985(3) as applicable only to "State action," relying exclusively upon *Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 1253. We believe that the results obtained by the decision below ignore the fact so ably pointed out in the concurring opinion of Justice Harlan in *Monroe v. Pape*; 365 U.S. 167, that the question of whether "State action" is essential to a cause of action under the provisions of 42 USC, Section 1985, has not been passed upon by this Court.

The conclusion reached by the Fifth Circuit Court of Appeals, that the provisions of 42 USC, Section 1985, are inapplicable under the facts and circumstances of this case, is further contrary to and in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Brewer v. Hoxie School District No. 46*, 238 F.2d 91.

It is respectfully submitted that on the basis of these two issues, this petition for writ of certiorari should be granted. Clearly, an appellate court should not undertake to itself the duty of trying a litigant's lawsuit, and the supplying and consideration of issues which were neither raised, briefed, nor argued is contrary to all well-settled rules of procedure, as well as long-established jurisprudence of this Court. Equally important is the fact that the scope of activity prohibited by the provisions of 42 USC, Section 1985, is now squarely before this Court and should be resolved. We respectfully submit that the provisions of this section are not limited in application to "State action" but apply to any conspiratorial effort which

results in hindering "the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . ."

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 1343(1), reading as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; . . ."

Title 42, United States Code, Section 1985(3), reading as follows:

> **"Depriving persons of rights or privileges.**
>
> "(3) **If two or more persons in any State or Territory conspire** or go in disguise **on the highway** or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; **or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;** or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal man-

ner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. Sec. 1980." (Emphasis supplied)

STATEMENT OF THE CASE

The original complaint seeking injunctive relief was filed on December 15, 1961, in the United States District Court for the Eastern District of Louisiana, Baton Rouge Division. By these proceedings, the Sheriff of the Parish of East Baton Rouge, Louisiana, the Chief of Police of the City of Baton Rouge, Louisiana, and the Mayor-President, in his capacity as Mayor of the City of Baton Rouge, each appearing in their individual and official capacities, sought and were granted a temporary restraining order against the Congress of Racial Equality and those acting in concert with it. This order was designed to prevent "breaches of the peace and agitation likely to cause violence and disruptancies of the public peace" arising out of certain unlawful demonstrations and acts of the defendants which occurred in the City of Baton Rouge on December 15.

Jurisdiction was invoked primarily under the provisions

of 42 USC, Section 1985(3), and the verified allegations of the complaint that the defendant organization and others acting in concert with it had been (and would continue to do so unless restrained) engaged in a conspiracy which prevented and hindered these public officers in their efforts to secure the equal protection of the laws to all citizens.

The motion for a preliminary injunction was assigned for hearing on January 4, 1962. At that time, **by consent of counsel,** a preliminary injunction was issued in the form and substance of the temporary restraining order, and the application for a permanent injunction was fixed to be heard on the merits on January 11, 1962.

In response to the complaint, defendants filed an answer and "counterclaim," but filed no other preliminary motions designed to test the sufficiency of the complaint. In other words, the defendants did not file a motion to dismiss for failure to state a cause of action upon which relief could be granted; to the contrary, in their answer and counterclaim, the defendants sought to invoke the jurisdiction of the Federal Court and thus submitted the issues raised by the complaint to a trial on the merits.

The hearing on the merits of the controversy was conducted on January 11 and January 12, 1962. For the purpose of this application, it suffices to point out that at this hearing, plaintiffs offered numerous witnesses—impartial newspaper and television reporters who were present during the demonstrations, public officials, and law enforcement officers. As subsequently found by the District Judge, all of these witnesses were of the "considered opinion * * * that there was a clear and present danger of violence and of a breakdown of

governmental authority" directly attributable to "the manner in which the congregation and demonstration of the estimated 2,000 persons involved was conducted under the apparent leadership of B. Elton Cox," the latter being the recognized leader of the CORE organization in Baton Rouge.

The defendants offered no witnesses; presented no evidence. They sought in the District Court, and again in the Court of Appeals, to justify their unlawful activities solely on the ground that they have the right to assemble and to express themselves on the public streets at any time, at any place, and in any manner that they so choose, regardless of its interference with the rights of fellow citizens to use the streets for normal purposes, and irrespective of whether or not such use of the streets results in public disorder and threatened breaches of the public peace which the law enforcement officials may not control or restrain save through arrest and incarceration.

As pointed out above, jurisdiction of these proceedings was invoked under the provisions of 42 United States Code, Section 1985(3). In the view of the District Court, jurisdiction was properly vested by these provisions under the holding of this Court in *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939.

Following the hearing on the permanent injunction, the District Court concluded "that the defendants were in violation of the provisions of Title 42, USCA, Section 1985(3)," and that the plaintiffs "were entitled to injunctive relief in connection with those violations," citing and relying upon *Brewer v. Hoxie School District No. 46*, supra.

From the permanent injunction thus issued by the Dis-

trict Court, the defendants appealed to the Fifth Circuit Court of Appeals. This appeal was argued on December 11, 1962. It was not decided until September 12, 1963. Although the arguments before the Fifth Circuit Court of Appeals and the briefs submitted in support of those arguments had centered around the merits of the controversy, that is, whether or not injunctive relief was proper under the circumstances of the case, the Court of Appeals reversed and remanded the case on the theory that no "State action" necessary to "support a suit invoking the Fourteenth Amendment and statutes enacted to enforce that amendment" had been demonstrated. In this respect, the Court of Appeals relied on *Collins v. Hardyman*, supra.

In this respect, also, the opinion rendered September 12, 1963, in effect sustained a motion to dismiss which was never filed in these proceedings. The Circuit Court of Appeals certainly was not under the erroneous presumption that such a motion had been filed. The conclusion is inevitable that the Court of Appeals supplied such a motion at its own instance. The simple and uncontradicted fact is that no motion to dismiss was ever filed, and we do not believe that the Court of Appeals had the authority, on appeal, to supply that which the defendants themselves did not. Not only did the Court of Appeals itself supply the motion to dismiss, but it further sustained that motion on legal issues which the defendants neither raised, briefed, nor argued in the Court of Appeals, or in any other court.

In reaching its conclusion to reverse and remand these proceedings, the Court of Appeals agreed with the holding of the District Court that jurisdiction was vested by the complaint in the Federal Court, relying, in this regard, on *Bell v.*

Hood, supra, to the same extent as did the District Court. The Court of Appeals stated:

> "The District Court, therefore, had jurisdiction, even if the case should be dismissed for failure of the plaintiffs to show a cause of action under the Federal statutes on which the plaintiffs relied."

This is not an instance, therefore, where a case has been dismissed for want of jurisdiction, of which the appellate court may properly take notice on its own motion. To the contrary, this is a case where the appellate court found jurisdiction to have been properly asserted. Having found jurisdiction, the Court of Appeals should have decided the case on its merits just as was done in *The Congress of Racial Equality, et al v. Douglas*, 5th Cir., 318 F. 2d 95. Instead, the Court treated the case as one in which a motion to dismiss had been filed and proceeded to find that the plaintiffs had failed to assert a cause of action upon which relief could be granted. In doing so, the Court of Appeals sustained a motion to dismiss which had never been filed.

Having concluded that an issue only properly raised by a motion to dismiss was nonetheless before it, the Court of Appeals disposed of that issue on the theory that "State action" is an essential ingredient to redress under the provisions of 42 USC 1985(3). Not only do we believe this erroneous, but, more importantly, we believe that the established rules of appellate procedure require that litigants be afforded an opportunity to present arguments upon the basic issues of the case to be decided. In these proceedings, the issue of "State action" as a prerequisite to redress under 42 USC, Section 1985(3), was never raised by the appellants in the

Court below; it was, therefore, an issue which was never raised, briefed, or argued insofar as the litigants were concerned.

This issue made its first appearance in this lawsuit in the cloistered deliberations of the Fifth Circuit Court of Appeals. Counsel for the appellees was never afforded an opportunity to present argument on what was ultimately to be the decisive issue of the lawsuit. To so dispose of a lawsuit is to deprive a litigant of his day in Court. For this reason alone, this case should either be heard by this Court on this particular issue, or remanded to the Fifth Circuit Court of Appeals for appropriate argument.

But even if an Appellate Court has the plenary authority to dispose of lawsuits in the manner in which this lawsuit was disposed of, it is respectfully submitted that the conclusion reached by the Fifth Circuit Court of Appeals, revolving, as it did, around the issue of "State action," is clearly erroneous. In light of the unambiguous language of 42 USC 1985(3), the conclusion that "State action" is a prerequisite to application of the section effectively destroys it to the same extent as would its repeal by Congress.

REASONS RELIED ON FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT COURT OF APPEALS, ON ITS OWN MOTION, SUPPLIED AND DECIDED A MOTION TO DISMISS ON LEGAL ISSUES WHICH WERE NEITHER RAISED, BRIEFED, NOR ARGUED.

Jurisdiction of the Federal Court may be considered by an Appellate Court on its own motion (*Huffman v. Baldwin*, 82 F.2d 5). The opinion rendered by the Court below, therefore, properly concluded that the District Court had jurisdiction under the authority of *Bell v. Hood*, supra. Beyond this, the Court, on its own motion, could not go. But if some plenary authority permitted the Court to go further, we submit that, in all fairness, it should not have done so without having afforded counsel an opportunity to brief and argue the important legal issue upon which its opinion was to be predicated.

The decision of the Court of Appeals does violence to the jurisprudence which holds that questions which were neither raised, briefed, nor argued will not be considered by an Appellate Court on appeal. *U. S. v. Spector*, 343 U.S. 159, 72 S. Ct. 591, 96 L. Ed. 863; *Western Union Telegraph Company v. Winland*, 182 F. 493; *A. Schrader's Sons v. Wein Sales Corporation*, 9 F.2d 306.

And the opinion does violence to the basic legal principle behind these holdings; that is, that the burden of demonstrating error is on the appellant. *Kimball Laundry Company v. U. S.*, 166 F.2d 856. As it stands here, the court below, not appellants, suggested the "error"; the Court below, not appellants, supplied the legal arguments upon which the "error" was to be corrected.

In this case, counsel for the appellees have never been afforded an opportunity to argue or brief the questions raised by the opinion of the Court below, nor have counsel had an opportunity to present their interpretation of the case of *Collins v. Hardyman*, supra, upon which the Court's opinion

is so stoutly founded. Since the motion to dismiss (which the Court of Appeals supplied on its own motion) is sustained solely upon the holding of the Supreme Court of the United States in the *Collins* case, we respectfully submit that the ends of justice and fair play can only be served by remanding these proceedings so as to afford counsel for the appellees an opportunity to properly brief and argue the important and far-reaching issues raised by this phase of the decision below.

As to be hereafter pointed out, we do not believe that *Collins v. Hardyman*, supra, supports the conclusions reached by the Fifth Circuit Court of Appeals; nor do we believe that plaintiff's reliance on *Brewer v. Hoxie School District No. 46*, supra, can be used as a "springboard" for considering the issue of "State action" as a prerequisite to application of 42 USCA 1985(3), particularly where that issue had not been raised in the District Court by the only means available—a motion to dismiss. While it is true that counsel for appellees relied upon the case of *Brewer v. Hoxie School District*, supra, this reliance was solely for the purpose of demonstrating **jurisdiction** under the provisions of 42 USCA 1985(3) **and for the purpose of further demonstrating that injunctive relief could be granted under the cited statutory provision.**

Since the question of plaintiffs' right to proceed under 1985 was never raised by counsel for appellants, either by motion to dismiss or by any other appropriate pleadings in the District Court or in the Fifth Circuit Court of Appeals, this issue was never briefed or argued. The sole defense of the defendants, both in the lower Court and in the Appellate Court, was that injunctive relief was improper, not because "State action" was not demonstrated but because the defen-

dants had allegedly done nothing which justified injunctive relief, and argument was largely devoted to this restricted issue.

The appellant had the burden of demonstrating error. Clearly, this is the law in other cases. The appellant is further obligated in other cases to discuss those legal issues upon which he feels the District Court to have erred. Otherwise, he is held to have waived those issues.

Once issues are properly raised by assignment of error, the appellee is afforded an opportunity to understand the basis of the appeal, and to properly brief and argue the legal issues involved. In this case, however, this opportunity was never afforded counsel for the appellees, and counsel for these appellees sincerely believe, and respectfully suggest, that the legal issue which the Court below has raised and decided upon its own motion deserves further consideration by that Court or this Court in light of proper legal argument. Otherwise, appellees have been denied their day in Court.

An example of the distinction between "supplying" a defense and passing upon one properly raised is the case of *Mitchell v. Greenough*, 100 Fed. 2d 184, cited and relied upon by the Court below. As authority for its dismissal of the complaint here, the opinion complained of takes the position that this earlier case, in which the Appellate Court found jurisdiction but dismissed the case for failure of the plaintiffs to state a cause of action upon which relief could be granted, was authority for the Court below to do likewise. However, a careful review of *Greenough* will indicate that the defendants there filed a motion to dismiss for lack of jurisdiction, as well as demurrers which raised the question of the "sufficiency of

the facts stated in the complaint to constitute a cause of action." In other words, the defendants in *Greenough* had properly filed a motion to dismiss which raised the issue the Appellate Court undertook to consider, based upon proper argument of both counsel.

In this case, no similar motion was filed—not only was the motion not filed, but the legal issues inherent in such a motion were never raised, briefed, or argued by appellants. All of this was done in this case on the Court's own motion without benefit of argument, contrary to the above-cited and recognized principles of law. To this extent, *Greenough* is not "apposite here" as the opinion below suggests.

In the final analysis, whether legally required or not, counsel for appellees should have been afforded an opportunity to at least brief and argue the basic legal issue passed upon in the opinion rendered below, before decision, even if it required, at the request of the Court, the filing of supplemental briefs and the hearing of supplemental argument. The only means by which this right can be now protected, is by the granting of a writ of certiorari for this purpose.

II.

UNDER THE PROVISIONS OF 42 USCA 1985(3) "STATE ACTION" IS NOT REQUIRED OR NECESSARY TO STATE A CAUSE OF ACTION, AND *COLLINS V. HARDYMAN*, DOES NOT SO HOLD.

In support of its conclusion that "State action" is a prerequisite to a cause of action sought to be asserted under the

provisions of 42 USCA 1985(3), the Court below relied exclusively on the holding of *Collins v. Hardyman*, supra.

In *Collins*, suit was instituted under the provisions of 8 USCA, Section 47(3). Section 1985 was not before the Court. It was discussed only in passing by the three Justices who joined in the dissenting opinion and then only for the purpose of demonstrating that "State action" was not a requirement in all sections of the Civil Rights Act. This dissent was clearly of the opinion that "State action" was not a prerequisite for relief under the statutory provisions there before the Court, pointing out that the legislative history of the several sections of the Civil Rights Act clearly indicated that where Congress intended to limit civil rights legislation to action under color of State law, it said so in unmistakable terms.

In *Collins*, relief was sought by one organization of white citizens against another group of private individuals who were also white. California law made the acts of the defendants illegal. The majority opinion held that the action of the defendants did not deprive the plaintiffs of equal protection of the law, because the plaintiffs had a right to seek protection of the law to the same extent as did any other citizen of the State of California. In other words, the plaintiffs had not been denied equal protection of the law for there were California laws available for their protection to the same extent as they were available to all other citizens.

Viewed in light of its broadest concept, *Collins* is not applicable to these proceedings. The complaint here is that the plaintiffs have an equal right, with all citizens, to utilize the public streets and ways, and those who violate or hinder and prevent the exercise of this right prevent these plaintiffs from exercising a right which the law grants them. In this

case, contrary to *Collins*, plaintiffs' rights were effectively destroyed by the acts of CORE; there was no recourse save through injunctive relief under the provisions of 42 USC, Section 1985(3) as extended by *Brewer v. Hoxie*, supra.

This is not a case where these plaintiffs were solely prevented from exercising their rights by other individuals. The demonstrators in this case not only prevented plaintiffs from the exercise of their right, but actually interfered with State officials in their efforts to guarantee the plaintiffs the exercise of this right. Would not the same be true where all persons are authorized to register to vote, but cannot because certain individuals block the doorway of the Registrar of Voters? Would not the same be true where a crowd intimidates public officials in their efforts to guarantee a fair and impartial trial? In any of these examples, the State officials have clearly been interfered with, and are thereby unable to guarantee equal protection of the law to **all**. Are we to say that 1985 is applicable because "State action" is not involved?

In the final analysis, in each of these instances, as in the present case, there is a failure of State action solely because of the demonstrations. Because of this, there was no right which these plaintiffs could have asserted in Court or otherwise to insure free use of the public ways. Not even the State officials vested with authority to bring about free use of the public ways could accomplish this purpose because of interference by the defendants.

As pointed out above, we do not believe that *Collins* requires the conclusion that the only action prohibited by 1985 is "State action." If this be the case, then the adoption of the statute by Congress was a meaningless act. It would be diffi-

cult, if not impossible, to conceive what type of State action would be involved by which two or more persons conspire to go upon the highway and interfere with State officials in their efforts to provide equal protection of the law to all persons. It is hardly conceivable that the State or its officials could conspire to interfere with its own officials. It follows that if 1985 is to have any meaning at all, it must be given that meaning which its language clearly indicates. If given such a meaning, it becomes obvious that State action is not a prerequisite for the exercise of rights under 1985, as so eloquently pointed out by the dissenting opinion in *Collins v. Hardyman*:

> "The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. R.S. Section 1980(3) speaks of 'two or more persons in any State or Territory' conspiring. That clause is not limited to state officials. Still more obviously, where the section speaks of persons going 'in disguise on the highway . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws', it certainly does not limit its reference to actions of that kind by state officials. When Congress . . . did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms."

This conclusion reached by the dissenting opinion in *Collins* is further supported by the concurring opinion of Justice Harlan in the subsequent case of *Monroe v. Pape*, supra. In *Pape*, the question was whether or not the provisions of 42 USCA 1983 applied where police officers were acting outside of the scope of their authority, it being argued that this was not "State action" to which the statute referred. After a careful consideration of the history of this civil rights legislation, the Supreme Court concluded that this legislation

could be used to protect against violations of State law as well as Federal statutory provisions. Justice Harlan was of the opinion that the conclusion reached by the majority was proper, but could have been more simply reached, pointing out:

> "We have not passed upon the question whether 42 USC Section 1985, which was adopted as the second section of the Act that included Section 1983, was intended to reach only the Ku Klux Klan or other substantially organized group activity, as distinguished from what its words seem to include, any conspiracy of two persons with 'the purpose of preventing or hindering the constituted authorities of any state . . . from giving or securing to all persons within such state . . . the equal protection of the laws . . .' Without now deciding the question, I think it is sufficient to note that the legislative history is not without indication that what the words of the statute seem to state was in fact the meaning assumed by Congress."

It is obvious by reference to the above citation that the Supreme Court of the United States has not held Section 1985 to be limited in its application to cases involving "State action." This being the case, a motion to dismiss, even though one had been properly filed in these proceedings, should not have been sustained. The case should have more properly been decided on the question of whether or not these demonstrators did in fact interfere with the duly constituted authority in providing equal protection of the law to all persons. If there was such interference, as the District Court found there to be, the injunctive relief granted by the District Court should have been sustained under the authority of *Brewer v. Hoxie School District*, supra.

The only conceivable basis on which *Brewer* cannot be

considered authority here, is that initially argued by counsel for the defendant in the District Court: that is, that the *Brewer* case involved an effort on behalf of a school board to provide integrated facilities and thus afford equal protection of the law to negro children; that other citizens who are denied equal protection of the law are not entitled to similar relief in the Federal Courts. Of course, all persons have civil rights regardless of race, color or creed, as counsel finally admitted under questioning by the Court. But even without any such admission on the part of counsel, it is obvious from the provisions of 42 USCA 1985 that they were not designed to provide equal protection of the law for any one person or class of persons alone. As was pointed out in the *Brewer* case, the statute provides as follows:

> "Section 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties.
>
> "Depriving persons of rights and privileges.
>
> "(3) If two or more persons in any state or territory conspire . . . for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to **all** persons within such state or territory the equal protection of the laws . . ." (Emphasis added)

Clearly, the statute was designed to afford equal protection of the law to "all" persons. Under these circumstances, if injunctive relief was properly sought and granted in the *Brewer* case, it may equally be sought and granted in these proceedings.

The conclusion of the Court below (gratuitous in view of its holding) that no conspiracy existed within the meaning of the statute disregards the testimony and the findings of fact.

Without detailing again the facts of this case, it suffices to say that what was done by these demonstrators was clearly sufficient to constitute a conspiracy under the provisions of 42 USCA 1985, for as pointed out in *Hoffman v. Halden*, 268 F.2d 280:

> "It should be axiomatic that what one person can do, two or more persons can do jointly or in concert. This is in reality all that a civil conspiracy is—concerted action or a sort of civil partnership in the commission of the injury whereby one may act for his partner and both be bound."

Clearly, there was "concerted action" here on the part of this defendant organization and others acting together with it. The result of that "concerted action" was to hinder and interfere with the duly constituted authorities in providing equal protection of the law to all persons.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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CERTIFICATE

I certify that I have this day mailed a copy of this petition for writ of certiorari, postage prepaid, via air mail, to Carl Rachlin and Stephen C. Vladeck, attorneys for respondents, at their office at 280 Broadway, New York 7, New York.

Baton Rouge, Louisiana, November _____, 1963.

John V. Parker

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19703

CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,

Appellants,

versus

BRYAN CLEMMONS, WINGATE WHITE and JOHN CHRISTIAN, the latter in his official capacity as Mayor-President of the City of Baton Rouge, Louisiana,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(September 12, 1963.)

Before TUTTLE, Chief Judge, WISDOM, and GEWIN, Circuit Judges.

WISDOM, Circuit Judge: This case presents new twists in civil rights litigation. The thrust of the holding below is that the State action here was action of the Congress of Racial Equality and Negro demonstrators. The State invokes the

Fourteenth Amendment against private individuals, although the Fourteenth Amendment establishes constitutional rights in favor of private individuals and against the State. Moreover, this unusual federal action is in an area that is essentially one of State responsibility—the preservation of public order; and there is no lack of breach of peace statutes in Louisiana. The relief sought and granted in the name of the Fourteenth Amendment is a federal injunction to protect the police power of the State from private persons said to have interfered with the constitutional duty of city and parish officers to provide equal protection of the laws to all citizens. The interference consisted of a demonstration of Negro college students in front of the Courthouse in Baton Rouge, drawing to that location most of the city and parish police officers. Implicit in the district court's decision is the notion that when private persons interfere with a duty imposed on a State by the Fourteenth Amendment, it becomes a matter of sufficient federal concern to justify prior restraints by federal injunction. In the circumstances, a proper regard for the federal system requires that the Court scrutinize closely the question of jurisdiction and whether on the merits the case is indeed one arising under the Constitution and laws of the United States.

This action arose out of a demonstration of Negroes in Baton Rouge, Louisiana, to protest the jailing of pickets who had urged a boycott of stores practicing racial discrimination. December 15, 1961, a large group of Negro students from Southern University, under the supervision of officers of the Congress of Racial Equality, marched from Scotlandville, Louisiana, to the Courthouse in Baton Rouge, a distance of four and a half miles. The Mayor of Baton Rouge had instructed the police office to provide necessary protection to the demonstrators as long as their activities were orderly. At times the march blocked traffic, but there was no disorder. When the march reached the Courthouse the crowd, marchers and Negro

bystanders, numbered about 1500 to 2000. There were about 300 white men across the road from the demonstrators. All of the police officers on duty and sixty off-duty officers were pressed into service. The Negroes followed orders given by the Reverend B. Elton Cox, an officer of CORE. When the marchers first arrived in the downtown area, Cox and the Chief of Police conferred. Cox said that the demonstrators wanted to congregate for seven minutes at the Courthouse, where the parish prison is located; that they would say the Oath of Allegiance, sing two songs, hear a four-minute speech, and then return to Southern University. The Chief of Police told Cox that such a demonstration was permissible as long as it was orderly. The demonstration took place as planned, and without any disorder, until Cox urged the Negroes to go to lunch counters in twelve stores, demand service, and refuse to move for one hour. The trial judge found: "It was at this moment, according to the uncontradicted testimony . . . that an outbreak of physical violence was almost a certainty"; the "entire situation was 'tense with impending violence' and the conduct of the crowd 'was fast approaching a mob reaction.' " When the demonstrators refused to move, the sheriff ordered tear gas bombs to be fired into the crowd. The streets were cleared within two minutes.

Alleging an imminent threat of further demonstrations, the mayor and law enforcement officials of Baton Rouge sought injunctive relief in the federal district court. The complaint avers that CORE, its officers and agents, and John Doe and Mary Doe and others were fomenting violence and breaches of peace in the City of Baton Rouge and were encouraging a conspiracy to violate the laws of Louisiana and of the United States. The gist of the complaint is stated in the following allegation:

> "[T]he actions of these defendants and others acting in concert with them, has resulted in the obstruction and complete blockage of certain public streets and ways of

the City of Baton Rouge, thereby denying and depriving plaintiffs and individual citizens of the State of Louisiana and of the United States of America of their civil rights, including the right to freely use the public streets and ways without interference and hindrance; and in addition, these acts on the part of the defendants, and others in concert with them, are such as to hinder plaintiffs in their official capacities as constituted authorities of the Parish of East Baton Rouge, Louisiana, and of the State of Louisiana, and of the City of Baton Rouge, Louisiana, from giving or securing to all persons within said State, Parish and City the equal protection of the laws, including the equal right of all the citizens to use the public ways of the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana, in a normal, peaceful and customary manner, all of which is in violation of the provisions of Title 42, Section 1985(3) of U. S. Code Annotated."

The plaintiffs assert jurisdiction under 28 U.S.C.A. 1332, the diversity statute, and 28 U.S.C.A. 1343, providing for jurisdiction of "any civil action authorized by law to be commenced by any person . . . because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42. . . ."

The defendants, in their answer, admit the plaintiffs' jurisdictional allegations and; in addition, invoke jurisdiction on their own behalf under 28 U.S.C.A. 1331, the federal question statute, 42 U.S.C.A. 1983, 42 U.S.C.A. 1981 and 28 U.S.C.A. 2281. In a counterclaim they urge that their activities were protected under the First and Fourteenth Amendments and ask that the plaintiffs be enjoined from interfering with their constitutional rights of freedom of speech and freedom of assembly.

The trial judge found that the plaintiffs were entitled to injunctive relief and issued a sweeping permanent injunction restraining "the Congress of Racial Equality, and John Doe and Mary Doe and each of them and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from . . . financing, sponsoring, encouraging or engaging in meetings or any other activities whereby violations are suggested, advocated or encouraged."[1] The defendants appeal, urging, among other contentions, that the injunction is so broad as to abridge, by prior restraints, their freedom of speech. We do not reach that issue. We reverse the case with directions to dismiss for failure of the plaintiffs to show a federal cause of action upon which relief may be granted.

[1] The judgment provides, in pertinent part:

"ORDERED, ADJUDGED AND DECREED that the preliminary injunction heretofore granted and issued by this Court herein on the 4th day of January, 1962, and entered in the office of the Clerk of this Court on the 4th day of January, 1962, be and the same hereby is made perpetual and permanent to the extent set forth below, and that the defendant corporation, Congress of Racial Equality and John Doe and Mary Doe and each of them and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, be permanently and perpetually enjoined and restrained from financing, sponsoring, encouraging, or engaging in meetings or any other activities whereby violations of existing State or Federal laws are suggested, advocated, or encouraged; from financing, sponsoring, encouraging, or engaging in meetings whereby the public ways, streets, sidewalks, or highways, of the City of Baton Rouge, or the Parish of East Baton Rouge, are blocked, or the unimpaired use thereof denied to other traffic; from financing, sponsoring, encouraging, or engaging in meetings or any other activities wherein or whereby disobedience to the lawful orders of properly constituted law enforcing agencies and their personnel is advocated, suggested or encouraged; from financing, sponsoring, encouraging, or engaging in meetings or any other activities designed or held for the purpose of impeding or obstructing the administration of justice or the orderly functions of government; and from financing, sponsoring, or encouraging, or engaging in any activities designed to, or which do, impede hinder, or obstruct officers of the law, or officials of the Parish of East Baton Rouge, or the City of Baton Rouge, from performing and discharging the duties of their respective offices." (Record, pp. 365, 366)

I.

There is clearly no diversity jurisdiction. 28 U.S.C.A. 1332 stipulates that

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different states . . . ."

In the first place, the complaint fails to allege the jurisdictional amount. The trial judge stated that the court had jurisdiction under section 1332, but he made no finding that the matter in controversy exceeded $10,000. In oral argument counsel for the appellees suggested we take judicial notice of the fact that demonstrations by 2,000 Negroes likely to result in violence would cause property damage in excess of the jurisdictional amount. Even if we should follow this suggestion, we should have to hold that the plaintiffs failed to make a sufficient showing of diversity of citizenship between the parties to support jurisdiction.

The complaint states that the defendants are "the Congress of Racial Equality, a corporation incorporated under the laws of the State of New York, and John Doe and Mary Doe, whose exact names and addresses are unknown to the plaintiffs; but who are citizens of the United States and **non-residents of the State** of Louisiana." This allegation will not support the trial court's jurisdiction. Diversity of **citizenship**, not of **residence**, is required under 28 U.S.C.A. 1332. "Wherever jurisdiction is predicated upon the citizenship (or alienage) of the parties, it should be noted that since residence is not the equivalent of citizenship, an allegation that a party is a resident of a certain state or foreign country is not a sufficient allegation of his citizenship." 2 Moore, Federal Practice ¶8.10, p. 1636 (2d Ed.). "Residence alone is not the equivalent of citizenship, although the place of residence is prima facie the

domicile." *Stine v. Moore*, 5 Cir. 1954, 213 F.2d 446. See *Neel v. Pennsylvania Company*, 1895, 157 U. S. 153, 15 S. Ct. 589, 39 L. Ed. 654; *Realty Holding Company v. Donaldson*, 1925, 268 U. S. 398, 45 S. Ct. 521, 69 L. Ed. 1014; *Texaco-Cities Service Pipeline Co. v. Aetna Casualty & Surety Company*, 7 Cir. 1960, 283 F.2d 144. Here, the record, far from showing that the defendants were citizens of other states, indicates that the great majority of the demonstrators covered by the injunction were citizens of Louisiana. They were college students enrolled in a Louisiana Negro university. There is no basis therefore for the district court's assuming jurisdiction under 28 U.S.C.A. 1332.

II.

In addition to holding that there was diversity jurisdiction, the district court found that there was federal question jurisdiction under 28 U.S.C.A. 1331 and 42 U.S.C.A. 1985. Under Section 1331 district courts have "jurisdiction of all civil actions where the matter . . . arises under the Constitution, laws or treaties of the United States." The matter in controversy, however, must exceed $10,000. Since there is no allegation in the complaint as to the amount in controversy and nothing to indicate that the amount exceeds $10,000, the relevant jurisdictional statute is 28 U.S.C.A. 1343. Section 1343 has no reference to jurisdictional amount. This statute is one of the Civil Rights Acts adopted shortly after the Civil War in order to provide a federal forum for the protection of federally-granted rights under the Thirteenth, Fourteenth and Fifteenth Amendments. Subparagraphs (1) and (2) vest jurisdiction in district courts of civil actions to recover damages resulting from the conspiracies to interfere with civil rights referred to in Section 1985 of Title 42. Subparagraphs (3) and (4) allow actions in the district courts:

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of

any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Section 1985(3) limits the conspiracy to one in which

> "two or more persons . . . conspire . . . for the purpose of depriving . . . persons of the equal protection of the laws."

The complaint alleges:

> "[The defendants] are sponsoring, financing and encouraging John Doe and Mary Doe and others . . . to foment violence, to provoke breaches of the peace and other law violations, . . . and are encouraging others to conspire with them to violate the laws of the State of Louisiana and of the United States . . . depriving plaintiffs as individual citizens of the State of Louisiana and of the United States of America of their civil rights . . . [The defendants] hinder plaintiffs in their official capacities as constituted authorities of the Parish of East Baton Rouge, Louisiana, and of the State of Louisiana, and of the City of Baton Rouge, Louisiana, from giving or securing to all persons within said State, Parish and City the equal protection of the laws, including the equal right of all the citizens to use the public ways of the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana, in a normal, peaceful and customary manner, all of which is in violation of the provisions of Title 42, Section 1985(3) of U. S. Code Annotated."

Very clearly, therefore, the plaintiffs have attempted to state a federally-granted right based on Sections 1343 and 1985(3).

A distinction must be drawn between the question of federal jurisdiction and the question of the sufficiency of the complaint (and the evidence) to show a cause of action arising under the Constitution and laws of the United States. The Supreme Court's analysis of Federal question jurisdiction in *Bell v. Hood*, 1946, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939, supports the view that the complaint in this case, as drafted, states an action created or arising under the Civil Rights statutes enacted to carry out the Fourteenth Amendment. The district court therefore had jurisdiction, even if the case should be dismissed for failure of the plaintiffs to show a cause of action under the federal statutes on which the plaintiffs rely. In *Bell v. Hood* the plaintiffs alleged that certain F.B.I. agents had imprisoned them and made an illegal search and seizure of their premises in contravention of the Fourth and Fifth Amendments, and they sought damages from the individuals solely on the basis of their constitutional rights. The Supreme Court stated:

> "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents' conduct pursuant to the conspiracy resulted in damages in excess of $3,000. It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. . . . [W]here the complaint,

as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit." 327 U. S. at 681-82

Upon the remand in *Bell v. Hood* the district court dismissed the complaint for failure to state a claim upon which relief could be granted, "being of the opinion that neither the Constitution nor the statutes of the United States give rise to any cause of action in favor of plaintiffs upon the facts alleged." *Bell v. Hood*, S.D.Cal. 1947, 71 F. Supp. 813, 820.

The holding in *Mitchell v. Greenough*, 9 Cir. 1938, 100 F.2d 184, **cert. den'd** 1939, 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056, is apposite here. In that case the question was whether a conspiracy to convict the plaintiff of a crime through perjured testimony, thereby resulting in his disbarment, was "a conspiracy for the purpose of impeding the due course of justice in an attempt to 'deny to any citizen the equal protection of the laws.'" The court held that since the only claim stated was one under a federal statute, the district court "had jurisdiction to decide that the plaintiff had failed to state a cause of action under that statute." When it reached this point, the Court held that the right to practice law in a state is not a federally protected right and that no purpose to deprive the plaintiff of equal protection was shown.

III.

Mitchell v. Greenough brings us to the question whether the plaintiffs stated and made a showing of a federally-granted cause of action. We reach the same result the Ninth Circuit reached in *Mitchell v. Greenough*.

Section 1985(3) provides:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the prem-

> ises of another, for the *purpose of depriving*, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or *for the purpose of* preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

A. Section 1985(3) states plainly that the conspiracies in question must be "for the purpose of depriving" persons of Fourteenth Amendment rights. The courts have not whittled away this requirement. Thus, the Supreme Court has said that there must be "intentional or purposeful discrimination between persons or classes." *Snowden v. Hughes*, 1944, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497. "[T]he Act defines conspiracies of a very limited character. They must, we repeat, be 'for the purpose of *depriving* . . . of the *equal protection of the laws*, or of *equal privileges and immunities under the laws*." (Italics supplied by the Supreme Court.) *Collins v. Hardyman*, 1951, 341 U. S. 651, 660, 71 S. Ct. 937, 95 L. Ed. 1253.

There is nothing in the complaint and nothing in the record to show purpose on the part of the defendants to deprive anyone of equal protection of the laws. On the contrary, the whole object of the demonstration was to secure equal protection of the laws for all. At most, the plaintiffs alleged and proved that the defendants blocked traffic (for a short while) and that the Baton Rouge officials called a large number of police to the Courthouse, reducing police protection in other

parts of the City. A similar situation exists every year at Mardi Gras. But no one would suggest that the crowds on Canal Street and the consequent reduced police protection in New Orleans give rise to actions under Section 1985(3). The Negro march and demonstration in Baton Rouge on December 15, 1961, Carnival parades in New Orleans, and St. Patrick's Day parades in New York produce similar effects. The inconvenience and even damage they may cause some citizens, because of diminished police *protection*, provide no basis for constructing out of thin air a purpose to deprive others of their right to equal *protection* of the laws. The contention has the earmarks of a bad pun.

In *Collins v. Hardyman*, the evidence showed that the defendants broke up the plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. As Mr. Justice Jackson, for the Court, said:

> "To be sure, this is not equal injury, but it is no more a deprivation of 'equal protection' or of 'equal privileges and immunities' than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws and to protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob."

The instant case is stronger than *Collins v. Hardyman*. In both cases the defendants were private persons, but in *Collins v. Hardyman* there was no doubt that the plaintiffs'

rights were "lawlessly violated." Here we have a different story. Further, freedom of speech and freedom of peaceable assembly are in the balance. In both cases, however, as the Supreme Court said in *Collins v. Hardyman*:

> "What we have here is not a conspiracy to affect in any way these plaintiffs' equality of protection by the law, or their equality of privileges and immunities under the law."

The absence of a purpose on the part of the defendants to deprive any one of rights to equal protection of the laws distinguishes this case from *Brewer v. Hoxie School District*, 8 Cir. 1956, 238 F.2d 91. In *Brewer v. Hoxie*, an Arkansas school district, which had desegregated, was forced to close its schools because of the activities of the defendants, who had engaged in a campaign of violence and intimidation. The school district, its directors, and superintendent obtained an injunction in the federal district court against the White Citizens Council and other organizations and individuals from continuing interference with their desegregation efforts. On appeal, the Eighth Circuit refused to order the action dismissed. In the Arkansas case the defendants made no bones about their purpose. Their avowed object was to close the Hoxie School in order to deprive the Negro children of their right, under the Equal Protection Clause, to attend a desegregated school. Here, unlike *Brewer v. Hoxie*, there is no allegation in the complaint and no evidence to suggest that the defendants *purposefully* deprived others of their right to equal protection of the laws.

B. The plaintiffs' case is fatally defective for another reason: they were deprived of no *federal* rights. Blocked traffic inconvenienced some citizens. Diminished police protection was a hazard to some citizens. But this does mean that the rights adversely affected were federal rights.

In *Milles v. Armstrong*, 7 Cir. 1953, 207 F.2d 284, the Court held that an aggravated assault upon the plaintiff and

the wanton destruction of his property did not affect the privileges and immunities incident to United States citizenship. The Court stated:

> "[T]o be valid the act must be held to apply only to deprivation of federal rights. If it be so construed as to include deprivation of purely state rights, it would not seem to be within the Constitution."

Love v. Chandler, 8 Cir. 1942, 124 F.2d 785 was a suit for damages against Federal and State officials and private persons for conspiracy to prevent the plaintiff from obtaining employment with the Works Progress Administration. The court dismissed the action on the ground that the right to employment was not a federally created right. In *Ferrer v. Fronton Exhibition Co.*, 5 Cir., 1951, 188 F.2d 954, this Court dismissed a suit charging conspiracy to import alien contract labor, contrary to a federal statute, thereby depriving plaintiff of employment, on the ground that there was no federal right involved. *Downie v. Powers*, 10 Cir. 1951, 193 F.2d 760, is closely analogous to the instant case. The plaintiff sued city officials and individuals alleging that the defendants, private persons, had broken up a meeting of Jehovah's Witnesses by violence and that the city officials had failed to protect the plaintiffs against such action. The trial court instructed the jury that Section 1985(3) required proof of a conspiracy involving the city officials. The Court of Appeals upheld the instructions but reversed for other errors.

If the defendants impaired any right of the plaintiffs, it was the right to police protection. This right is derived from the State, not the Federal Government. Private citizens deprived of such a right by other private citizens have not been deprived of a federally-granted right, giving rise to an action based on the Constitution and laws of the United States.

We do not consider the constitutional question whether

Congress would have the power to enact a statute to prohibit conspiracies having the purpose of depriving citizens of rights arising under state laws. We point out, however, as the Supreme Court did in *Collins v. Hardyman*, that to construe Section 1985(3) as applicable to state-granted rights would raise a serious constitutional question.

C. A third fatal weakness in the plaintiffs' case is that the defendants are private persons. It is still the law that the Fourteenth Amendment and the statutes enacted pursuant to it, including 42 U.S.C.A. 1985, apply only when there is state action. *Collins v. Hardyman*, 1951, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; Civil Rights Cases, 1883, 109 U. S. 3, 27 L. Ed. 835; *United States v. Harris*, 1883, 109 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290. As the Court said in the *Civil Rights Cases:*

> "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws." Civil Rights Cases, 1883, 109 U. S. 3, 27 L. Ed. 835.

The Supreme Court recently reasserted this restriction upon the scope of the Fourteenth Amendment in *Peterson v. City of Greenville*, 1963, 373 U. S. 244, 247, S.Ct. L.Ed.2d

There are two major exceptions to this principle. As pointed out in *Collins v. Hardyman*, one exception is a massive conspiracy such as the Klan in Reconstruction days, "so farflung and embracing such members . . . [as] to deprive

Negroes of their legal rights and to close all avenues of redress or vindication." 341 U. S. at 662. The other exception applies when private persons take over governmental functions. *Smith v. Allwright*, 1944, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987; *Rice v. Elmore*, 4 Cir. 1947, 165 F.2d 387, *cert. den'd* 1948, 333 U. S. 875; *Baskin v. Brown*, 4 Cir. 1949, 174 F.2d 391; *March v. Alabama*, , 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265. Neither exception applies to the case before us.

The plaintiffs, relying on *Brewer v. Hoxie School District*, 8 Cir. 1956, 238 F.2d 81, argue: the law enforcement officials of Baton Rouge have a constitutionally imposed duty to accord equal protection of the law to all persons; the defendants interfered with the officials' performance of that duty, causing the local officials to deprive others of equal law enforcement; this constituted state action. As we have pointed out, *Brewer v. Hoxie* is distinguishable because of the purposeful deprivation of civil rights. That case bears only a superficial resemblance to the instant case. The action enjoined in *Brewer v. Hoxie* was one step removed from action by state officials; the action sought to be reached here cannot possibly be contorted into state action. In any event the Supreme Court has spoken expressly in *Collins v. Hardyman*: the Civil Rights Acts apply only to state action.

In sum, (1) the plaintiffs have failed to state or to show that the defendants conspired *purposefully* to deprive others of equal protection of the laws, as required by Section 1985(3); (2) there is no federal right in the city officials, individually or on behalf of the Baton Rouge citizenry, to be protected in the performance of their municipal duties, as 28 U.S.C.A. 1331 requires of an action arising under the Constitution and laws of the United States; and (3) there is no state action here such as is necessary to support a suit invoking the Fourteenth Amendment and statutes enacted to enforce that amendment.

Since there is neither diversity of jurisdiction nor a federal claim, the action is REVERSED and REMANDED with

directions to the district court to dissolve the injunction and to dismiss the complaint forthwith.

GEWIN, Circuit Judge, Concurring Specially:

I concur in the result reached. In my opinion neither the complaint nor the proof sustain federal jurisdiction. If the principles affirmed in *Brewer, et al. v. Hoxie School Board District, etc., et al.*, 8 Cir. 1956, 238 F.2d 91, could be sustained when measured by *Collins, et al. v. Hardyman, et al.*, 341 U.S. 651, 95 L.Ed. 1253, it is my opinion that federal jurisdiction could not be sustained under the *Brewer* case. On the question of diversity the instant case is clearly distinguishable from our recent case of *The Congress of Racial Equality, et al. v. Douglas*, 5 Cir. 1963, 318 F.2d 95, wherein it was held:

> "Jurisdiction was vested in the district court by way of 28 U.S.C. § 1332, diversity of citizenship, the Congress of

In Kelley v. Page, No. , of the Docket of this Court, City Officials of Albany obtained an "injunctive order," similar to the order in the instant case, against M. S. Page, Dr. W. G. Anderson Slater King, Charles Jones, Reverend Martin Luther King, Jr., Reverend Ralph Abernathy, Reverend Wyatt Tee Walker, Mrs. Ruby Hurley, Congress of Racial Equality, Southern Christian Leadership Conference, Student Non-Violence Coordinating Committee, The National Association For The Advancement Of Colored People, and the Albany movement and other persons whose names are unknown and who are acting in concert with them. On motion of the defendants, the Honorable Elbert P. Tuttle, Chief Judge, set aside the order as "null and void." Judge Tuttle's order states "On the merits of the motion the defendants contend that the complaint filed in the District Court asserts federal jurisdiction only under the several Civil Rights Acts, which in turn are based upon Section 1 of the Fourteenth Amendment to the Constitution of the United States. This is conceded by the plaintiffs. It being clear that the Supreme Court of the United States has held that the Civil Rights Acts do not encompass actions of the kind described in the complaint, see Collins v. Hardyman, 341 U. S. 651 and Screws v. United States, 325 U. S. 91, I am convinced that the trial court was without jurisdiction to entertain this suit. This being so, I am of the opinion that the injunctive order was null and void." In Congress of Racial Equality v. Douglas, 5 Cir. 1963, F.2d in which the district court enjoined CORE and certain private persons on the suit of the City of McComb, Mississippi, the Court did not find it necessary to discuss jurisdiction.

Racial Equality being incorporated in the state of New York, and all plaintiffs being citizens of the state of Mississippi."

I would emphasize the statement contained in the opinion of the majority, "Moreover, this unusual federal action is in an area that is essentially one of state responsibility — the preservation of public order; . . .", but I would not limit the State to breach of peace statutes in the choice and enforcement of a remedy. The circumstances revealed by the record in this case may authorize action under statutes other than "breach of peace statutes." As stated in *Collins v. Hardyman*, "[Louisiana] courts are open to plaintiffs and its laws offer redress for their injury and vindication for their rights."

In my judgment, the record does not support the statement in the majority opinion that ". . . the whole object of the demonstration was to secure equal protection of the laws for all." More than a mere demonstration took place. In the circumstances here present, municipal officials, police officers and others charged with the preservation of law and order must have the assistance of the courts, and this case is an example where state court action is highly appropriate. Once State Court jurisdiction has been invoked, Federal Courts should abstain from taking action, even if Federally protected rights become involved ultimately. *Burford v. Sun Oil Company*, 319 U.S. 315, 87 L. Ed. 1424.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By Clara R. James, Deputy

New Orleans, Louisiana Nov. 4, 1963

APPENDIX B

Bryan CLEMMONS, Wingate White, and John Christian, the Latter in His Official Capacity as Mayor-President, and as Such Mayor of the City of Baton Rouge, Louisiana, Plaintiffs,

v.

CONGRESS OF RACIAL EQUALITY, John Doe, and Mary Doe, Defendants.

No. 624.

United States District Court
E. D. Louisiana,
Baton Rouge Division.
Feb. 2, 1962.

Action initiated by sheriff of a parish, and a city and certain of its officials, against a corporation and others, for injunctive relief against certain allegedly unlawful activities sponsored by defendants. The District Court, West, J., held that activities which prevented and hindered state, parish and city authorities from giving and securing to all persons within a city and parish the equal protection of laws, were a violation of federal statute proscribing acting in concert for purpose of depriving any class of persons legal protection of the law.

Decree in accordance with opinion.

R. Gordon Kean, Jr., Parish Atty., John V. Parker, Asst. Parish Atty., Sargent Pitcher, Jr., Dist Atty., John F. Ward, Jr., Asst. Dist. Atty., Baton Rouge, La., for plaintiffs.

Johnnie A. Jones, Baton Rouge, La., for defendants.

WEST, District Judge.

This suit, seeking injunctive relief, was initiated by Bryan Clemmons, Sheriff of the Parish of East Baton Rouge, Louisiana, Wingate White, Chief of Police of the City of Baton Rouge, Louisiana, and John Christian, Mayor-President of the City of Baton Rouge and Parish of East Baton Rouge, State of Louisiana, as plaintiffs, against the Congress of Racial Equality, a New York corporation, hereinafter referred to as CORE, and John Doe and Mary Doe, nominal parties, described as "residents of states other than Louisiana," as defendants.

The plaintiffs' complaint alleges, in essence, that CORE and others associated with it, are sponsoring, financing and encouraging John Doe and Mary Doe and others to come into Baton Rouge to ferment violence, to provoke breaches of the peace and other law violations; that such actions on the part of the defendants and others acting in concert with them, have caused large numbers of people to congregate on the public streets and ways, contrary to the laws of the State of Louisiana; that defendants, and those acting in concert with them, have obstructed and blocked certain public streets and ways such as to deny and deprive plaintiffs and others for whom plaintiffs are responsible, of their civil rights, including the right to freely use said streets and ways, and their right to unimpaired and unhampered ingress and egress to public and private buildings in the area; that these actions on the part of the defendants have unlawfully interfered with the plaintiffs in the performance of their official duties and have unlawfully prevented the plaintiffs, as public officials, from giving or securing to all persons in the City and Parish the equal protection of the laws, including the equal right of all citizens to use the public ways and streets of the City of Baton Rouge and the Parish of East Baton Rouge, Louisiana, all in violation of the State Statutes hereinafter referred to.

and in violation of Title 42 U.S.C.A. § 1985(3); that such actions on the part of the defendants constituted a conspiracy for the purpose of restraining trade in violation of Title 15 U.S.C.A. § 1; that plaintiffs have no adequate remedy at law, and therefore injunctive relief is sought.

Defendants, in their answer, admit the jurisdiction of this Court as alleged by the plaintiffs, and further seek to invoke its jurisdiction pursuant to Title 28 U.S.C. § 1331; Title 42 U.S.C. § 1983; Title 42 U.S.C.A. § 1981; and Title 28 U.S.C. § 2281. Defendants deny "for lack of sufficient information to base a belief" all material allegations of the plaintiffs' complaint as written, and then admit that they, defendants, did in protest of racial segregation laws, customs, and usages, picket twelve stores which were referred to in the plaintiffs' complaint, urging persons in sympathy with their cause to refrain from patronizing those stores; they then allege that certain of the defendants who were picketing these stores were arrested and placed in jail for alleged violation of the Louisiana Statutes hereinafter referred to, which arrests, defendants allege, violated their right to freedom of speech as guaranteed by the First Amendment to the United States Constitution, and was contrary to the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution. Defendants further allege that they did "peaceably assemble in protest of racial segregation" in accordance with the rights of assembly afforded to all citizens by the First Amendment to the United States Constitution, and that they, the defendants, did publicly announce that they intended to continue to so assemble and protest in the future. Then, by counterclaim, the defendants allege that the activities in which the defendants were engaged on December 11, 12, 13, 14, and 15, of 1961, were not criminal in nature, nor did those activities contemplate criminal activities on the part of the defendants, and that therefore, the activities engaged in by the defendants on those days were not embraced within the terms and meanings of LSA—R.S. 14:59; 14:63.4;

14:92; 14:100.1; 14:103; and 14:103.1; and that the application of these laws to the activities of the defendants, including the arrest of the pickets, constituted a violation of their constitutional rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution. Defendants pray that the plaintiffs' demands for injunctive relief be denied, and that instead, an injunction issue against the plaintiffs, enjoining the plaintiffs from disturbing the defendants in the exercise of their alleged constitutional rights of freedom of speech and assembly, and further enjoining the plaintiffs from applying or enforcing the provisions of the Louisiana Statutes above mentioned to the activities of these defendants.

Upon the application of the plaintiffs, and the Court being of the opinion that the plaintiffs had no adequate remedy at law, and that immediate and irreparable injury or damage was imminent, a temporary restraining order was issued by this Court on December 15, 1961, restraining and enjoining the Congress of Racial Equality and John Doe and Mary Doe, and each of them, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from continuing to sponsor, finance, or encourage unlawful picketing in the City of Baton Rouge, from engaging or participating in any unlawful congregating or marching in the streets or other public ways of the City of Baton Rouge, Louisiana, from conspiring, encouraging, or participating in any boycott in restraint of trade, or from doing any other act designed to provoke breaches of the peace, or from doing any act in violation of the provisions of LSA-R.S. 14:59; 14:63.4; 14:92; 14:100.1; 14:103; 14:103.1, as well as Title 42 U.S.C.A. § 1985, and Title 15 U.S.C.A. § 1 et seq. This restraining order was then renewed on December 22, 1961, and after a hearing, on January 5, 1962, a temporary injunction in the form and substance of the temporary restraining order was issued pending this hearing on the merits. A full hearing on the merits of plaintiffs' application for the

issuance of a permanent injunction was held on January 11 and 12, 1962. During the trial of this case, the defendants did not choose to produce any witnesses or introduce any evidence of any kind. All of the facts, as hereinafter determined by this Court, resulted from evidence adduced at the trial of the case by the plaintiffs, and the cross-examination by defendants' attorneys of the witnesses produced by the plaintiffs. At the conclusion of the presentation of the plaintiffs' evidence, the defendants announced that they rested their case solely and entirely on the examinations and cross-examinations of plaintiffs' witnesses. From the evidence taken at the trial of this case, the Court now makes the following findings and conclusions, which shall be considered as its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A.

Some time shortly prior to December 8, 1961, the following letter was directed to and received by some twelve merchants and department stores in the City of Baton Rouge, Louisiana:

"Dear Sir: We have made several attempts by telephone to make appointments to negotiate with you in regard to securing equality in employment and desegregation of facilities for all citizens. We want to negotiate, but promptness, cooperation, and action are essential pre-requisites in order to achieve racial equality through negotiation.

"In spite of the busy Christmas season, it is necessary that we confer with you in person by Saturday, December 9, 1961, before 12:00 noon. We realize that Christmas is a busy season for buying and selling.

"If you cannot manage to arrange a personal conference before or on the deadline, kindly inform us as to your intentions. We hope that you will take immediate action in meet-

ing the aforesaid ends. In good faith, we submit our grievances and request satisfaction.

"Sincerely yours,

EXECUTIVE COMMITTEE OF BATON ROUGE CHAPTER OF CONGRESS OF RACIAL EQUALITY"

At approximately the same time, CORE, through its members and representatives, distributed circulars or handbills urging Negroes to refuse to patronize the twelve stores listed thereon until those stores afforded "better job opportunities" to the members of the Negro race, and until these stores desegregated all of their various facilities. Also, on December 8, 1961, and December 9, 1961, CORE sponsored a "clinic" in Baton Rouge, Louisiana, billed in their notices as "Direct Non-Violent Action Clinic." On the program for the clinic was such items as "workshops" in (1) sit-ins, (2) picketing, (3) freedom rides, (4) voter registration, (5) jail discipline, (6) discrimination of job opportunities, (7) hit and run demonstrations, (8) selective buying, and (9) reports of various groups involved in demonstrations.

On December 11 and 12, 1961, following this clinic, pickets were established in front of the several stores to whom the letters previously referred to had been directed. These pickets were members of the Negro race, and were apparently acting in accordance with instructions received from the leaders and representatives of CORE at the clinic held on December 8 and 9, 1961. They carried signs urging that the stores be boycotted because of their alleged discrimination against members of the Negro race. On Wednesday, December 13, 1961, these pickets were advised by officers of the Police Department of the City of Baton Rouge and/or by deputies of the Sheriff's Department of the Parish of East Baton Rouge that they were in violation of certain State Statutes, and that continued vio-

lations of these statutes would result in arrest and prosecution. On the following day, December 14, 1961, the pickets continued their activities, despite the warnings of the Police Department and/or the Sheriff's Department, and the arrest and incarceration in the parish jail of some twenty-three pickets followed.

It was apparently the arrest of these pickets that brought about the mass demonstration which occurred in the City of Baton Rouge, Louisiana, on December 15, 1961.

On the night of December 14, 1961, through unofficial sources, the Police Department and the Sheriff's Department learned that a large congregation of Negro people were to march from Scotlandville, Louisiana, north of the City of Baton Rouge, Louisiana, into the City of Baton Rouge, a distance of some four and one-half miles, to demonstrate against the arrest of the pickets who were incarcerated in the Parish jail located atop the Courthouse Building in the very heart of the city. At about 9:00 o'clock a.m. on the morning of December 15, 1961, students from Southern University, an all-Negro university located in Scotlandville, Louisiana, and others, went to a church building close to the university campus where they congregated for approximately 30 to 40 minutes. This congregation of Negroes under the direct control and supervision of officers, members, or representatives of CORE, then started their march to Baton Rouge, some four and one-half miles away. They marched down the main highway to Baton Rouge, and at times completely blocked the street to vehicular traffic. The police officers on duty in the area used public address systems to request the crowd to clear the highway. The requests were apparently ignored and the street was blocked to traffic for approximately 15 minutes. The crowd consisted of about "two blocks of people," but the witnesses could not estimate the number of persons particapting at this stage of the demonstration. After about fifteen minutes of marching, and apparently ignoring police requests to clear the

highway, an individual identified as Rev. B. Elton Cox inquired of one of the police officers present as to the proper procedure for his followers to use in their march to Baton Rouge. He was informed by the officer that it was a violation of Louisiana law for the marchers or demonstrators to obstruct the road or highway and that they must stay on the shoulders of the highway, leaving the highway clear for use by other traffic. Cox was identified by every witness who testified as an officer and leader of CORE, and he was further identified as a resident of the State of North Carolina. While the crowd completely ignored instructions given to them by the police officers, they apparently obeyed all orders given them by Cox. When they marched through intersections, it was necessary for police officers to manually operate the traffic lights in order to avoid accidents as the marchers refused to heed these traffic signals. However, after they reached a point within about one mile of the center of Baton Rouge, and upon instructions from Cox, the marchers began to obey the traffic lights and wait for the proper signal before crossing intersections. At one point during the march to Baton Rouge, there were five white men who attempted to block the path of the marchers, and they were immediately dispersed by the police officers in order to avoid any incident between the white men and the marching demonstrators. This march from Scotlandville to Baton Rouge took approximately two or three hours to complete.

The marchers were apparently divided into "squads," with each squad having a leader who gave orders. Each of the leaders wore "overseas" caps with the word "CORE" written on each side, and these "squad leaders" took their orders and instructions directly from Cox. The uncontradicted testimony shows that these demonstrators refused to take orders from the police and refused to follow police instructions, but that they apparently obeyed implicitly the orders or instructions given them by their squad leaders or by Cox.

Neither the officers or representatives of CORE, nor any of the demonstrators, made a request of the Police Department or of the Sheriff's Department for a permit to hold a parade or to stage a demonstration as is required by an ordinance of the City of Baton Rouge. Despite this fact, at no time during this march from Scotlandville to Baton Rouge, Louisiana, did the Police Department or Sheriff's Department or any other State, City, or Parish official attempt to interfere with the demonstrators or to break up their parade. During this entire march, according to the unrefuted testimony, the only request made by the police officers of the demonstrators was that they not block the highways or sidewalks in violation of existing statutes and ordinances of the State of Louisiana, the Parish of East Baton Rouge, and the City of Baton Rouge.

John Christian, the Mayor-President of the City of Baton Rouge and Parish of East Baton Rouge, testified that when he heard of this pending demonstration, he specifically instructed the Chief of Police and the Sheriff to provide all available protection to the marchers and demonstrators so long as their activities were orderly and lawful. He testified that there was no attempt made to prevent the "parade" or the demonstration in any way. However, after the demonstrators reached the downtown area of Baton Rouge, when it was estimated that there were somewhere between 1,500 and 2,000 people involved, the testimony shows that it was deemed necessary to use all police officers and deputy sheriffs available, including the recalling to duty of some sixty off-duty personnel. All available men from the Police Department and the Sheriff's Office were utilized to control traffic and to look out for the safety of the people involved in this demonstration, as well as other spectators, and that as a result, the rest of the City of Baton Rouge and the Parish of East Baton Rouge, outside of the immediate downtown area, was left virtually without police protection of any kind. The testimony further shows that when these demonstrators congregated in the downtown area, the entire sidewalk for an area of approxi-

mately two blocks, was completely blocked to all other traffic, and that ingress and egress to houses or other establishments in the vicinity was completely blocked. The testimony further showed that this crowd of some 2,000 people assembled on the west side of the street by the Courthouse where the jail was located, and that they began singing songs, reciting prayers, and listening to speeches made by Cox, who was, apparently, in complete charge of the entire demonstration. On the opposite side of the road a crowd of 200 to 300 white persons had gathered, and it was the testimony of everyone who testified that the entire situation was "tense with impending violence." When the demonstrators first arrived in the downtown area, Chief Wingate White, of the City Police force, personally conferred with Cox concerning his intentions. He was informed by Cox that these demonstrators wanted to appear before the Courthouse to protest the arrest of the twenty-three pickets and to say the Oath of Allegiance; sing two songs; and that he, Cox, would make a four-minute speech and then they would disperse and go back to the campus at Southern University. Cox advised Chief White that this demonstration would last approximately seven minutes. Chief White then advised Cox that such a demonstration would be permissible so long as it was orderly. During the entire demonstration, Cox was apparently in complete control of the crowd. They shouted and yelled at his commands, and they moved and stopped upon his orders. After the demonstrators had sung hymns, prayed and listened to speeches, Cox, according to the uncontradicted testimony of several witnesses, stood up before the crowd and told them that it was lunchtime, and suggested that they all go to the lunch counters in the twelve stores on the "list" and demand to be served. He suggested that if service was denied them, they should refuse to remove themselves from the lunch counters for a period of one hour. It was at this moment, according to the uncontradicted testimony adduced at the trial of this case, that an outbreak of physical violence was almost a certainty. When Cox urged the crowd to sit in at the lunch counters, where, he advised

them, he knew that they were "not welcome," the crowd cheered, applauded, and became extremely boisterous, and according to all of the evidence, was fast approaching a "mob reaction." It was shortly after this reaction that the demonstrators were forced to disperse by the use of tear gas fired into their midst by police officers. However, before the tear gas was used the Sheriff, believing that the situation was about to get out of hand, stood before the crowd using an electric megaphone and identified himself and suggested to the demonstrators that they had been allowed to demonstrate in accordance with their stated intentions, and that since they had been permitted to do everything that they had requested to do, he now felt that it was time for the demonstration to end. He requested them to disperse at that time. However, at this point, Cox stood before the crowd, folded his arms, and shouted to the crowd "Don't move." Whereupon some of the Sheriff's officers began to go toward the crowd as though to force them to disperse. The Sheriff recalled his men and again identified himself with the use of the electric loudspeaker, and again requested them to break up the demonstration and disperse. The testimony shows that Cox again stood before the crowd and shouted "Don't move" and the crowd did not move. At this point, the Sheriff ordered the police officers to fire tear gas bombs into the crowd. Tear gas was fired into both the colored demonstrators on the west side of St. Louis Street and the white crowd which had congregated on the east side of St. Louis Street, and within less than two minutes the crowd was completely dispersed.

Chief White, who has been in active police work since 1937, testified that it was his considered opinion that there was an immediate danger of an outbreak of physical violence during the demonstrations of this large crowd of people in the downtown area of Baton Rouge on December 15, 1961. Because of the large size of the crowd and the tenseness of the situation, he, and the Sheriff, had recalled all available police officers to duty to cope with the situation and what they

believed to be impending dangers. As a result, during the period of these demonstrations there was practically no police protection of any kind available for the rest of the City of Baton Rouge or the Parish of East Baton Rouge wherein approximately 230,000 people reside.

But even the dispersal of the crowd by the use of tear gas did not end the demonstration. After the crowd was dispersed with tear gas, they again reformed into smaller groups on Third Street, which is the main street in the city, where they remained milling around on the streets and sidewalks for approximately one hour. During this time, practically the entire police force and the personnel of the Sheriff's Department was utilized in the Third Street area in order to prevent any outbreaks of violence following the initial demonstrations. At one time during this latter part of the demonstration, approximately 200 boys of highschool age arrived on the scene dressed in old clothes and giving every indication that they were present to participate in violent activities of some kind. Upon orders from the police, this group of white boys was dispersed, with the exception of one white boy who, upon his refusal to obey the police orders to disperse, was arrested.

Every law enforcing officer who testified in this case, together with every State official who testified, was of the opinion that as this demonstration progressed, and as it reached its climax in the vicinity of the Courthouse, it presented an extremely dangerous situation. There was every evidence of pending danger and violence, and this crowd was on the verge of becoming a mob. As an example, one of the police officers testified that while there was no actual physical violence, nevertheless, during the course of this demonstration, he heard remarks from the demonstrators such as "We ain't leaving for no one", and "We can take 'em", and "There ain't enough of them to stop us". This officer testified that he feared at any moment there might be an attempt by these many demonstrators to overrun and overpower the small force of police officers present.

Mr. James T. Erwin, news director of a local radio station, and Mr. Albert Tonguis, photographer for a local television station, both testified that in their opinion the situation was extremely tense, and they feared an outbreak of violence at any moment. One of these witnesses stated that the situation was "as electric a situation as I have ever seen."

During the Third Street demonstration, following the demonstration at the Courthouse, two large department stores, Kress and McCrory, located on Third Street, found it advisable to close their doors because of the fear of being overrun by demonstrators. Around 8:00 o'clock or 9:00 o'clock that same night, a meeting was held by members of CORE in Scotlandville. A Negro spokesman addressed the crowd at that time and stated "They are dealing with the new Negro. We don't tell you what to do, we do it with you. How many of you are going back downtown with us tomorrow?" Since it seemed apparent that these demonstrations would continue and would be repeated the following day, with all of the attendant possibility of an outbreak of violence, the plaintiffs requested this Court to issue a temporary restraining order which was issued on December 15, 1961, and renewed on December 22, 1961, followed by the issuance of a preliminary injunction on January 5, 1962, as hereinbefore set forth.

During the trial of this matter, all of the witnesses admitted that during the entire course of these demonstrations, none of the 2,000 demonstrators, to their knowledge, were guilty of any acts of violence. They also emphasized the fact that the Rev. B. Elton Cox, on several occasions, advised the crowd of demonstrators against the use of violence. No witness saw any actual acts of violence such as street fights, etc., but every single witness, without exception, described the situation as "explosive."

From all of this evidence, which was completely uncontradicted, this Court comes to the inescapable conclusion that:

(1) the defendant, CORE, through its agents, officers, representatives, and others acting in concert with it, was directly responsible for and in complete charge of the "protest march" from Scotlandville, Louisiana, on December 15, 1962, culminating in the huge demonstration of some 2,000 people in the vicinity of the Courthouse in downtown Baton Rouge, and the subsequent demonstrations in the business area on Third Street in downtown Baton Rouge; (2) that the leader, identified as Rev. B. Elton Cox, was an officer and representative of CORE, and was in complete charge and control of the demonstrators, who were willing to, and did, obey his every command, even though it entailed and necessitated their violating the law or refusing to obey the orders or instructions emanating from lawfully constituted officials such as the Chief of Police for the City of Baton Rouge, the Sheriff of the Parish of East Baton Rouge, and the Mayor-President of the City of Baton Rouge and Parish of East Baton Rouge; (3) that even though the demonstrators themselves were apparently guilty of no acts of physical violence, it was the considered opinion of the Chief of Police, the Sheriff, and the Mayor-President, and all others who testified that there was a clear and present danger of violence and of a breakdown of governmental authority and the orderly administration of governmental affairs as a direct result of the manner in which the congregation and demonstration of the estimated 2,000 persons involved was conducted under the apparent leadership of B. Elton Cox; (4) that the Chief of Police, the Sheriff, and the Mayor-President were entirely justified in concluding that the situation on December 15, 1961, was so fraught with impending danger as to require them to take the necessary steps, including the use of tear gas, to immediately disperse the crowd of demonstrators and to bring the mass demonstration to an immediate end.

Having found the facts to be as stated above, from the uncontradicted evidence adduced at the trial of this case, the Court has reached the following conclusions of law:

Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1331; 28 U.S.C. § 1332; and 42 U.S.C.A. § 1985. Mitchell v. Greenough, 9 Cir., 100 F.2d 184; Condra v. Leslie & Clay Coal Co., D.C., 101 F.Supp. 774; Brewer v. Hoxie School District No. 46, 8 Cir., 238 F.2d 91; and Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939.

[1-3] Defendants, in their counterclaim, demanded that a three judge court be convened to hear this matter pursuant to the provisions of 28 U.S.C. § 2281. This demand was based upon the contention that the question of the constitutionality of certain State Statutes was at issue. The provisions of 28 U.S.C. § 2281 are not applicable here. In order to invoke the provisions of 28 U.S.C. § 2281 providing for the convening of a three judge court, a substantial question of the constitutionality vel non of a state statute must appear from the face of the pleadings. A mere allegation of unconstitutionality is not enough. Patterson v. Hardin, D.C., 145 F.Supp. 299. To raise a substantial constitutional question, the complainant must "seek to forestall the demands of some general state policy, the validity of which he challenges." Phillips v. United States, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800; in the instant case, the counterclaim filed by the defendants complains only that there was an *improper application* of certain state statutes to the activities engaged in by the defendants. It is merely alleged by the defendants that the activities engaged in by defendants, and those in concert with them, on December 11 through December 15, 1961, were not criminal in nature, and that such actions were not embraced within the terms of the particular Louisiana Criminal Statutes referred to. The defendants complain only that the "application" of these statutes to the particular acts engaged in by the defendants on those dates was unconstitutional, and as such, deprived the defendants of their constitutionally guaranteed rights of freedom of speech and assembly, and not that the statutes, if *properly* applied, were themselves unconstitutional. The pleadings presented in this case do not raise a serious question of the constitutionality

as such of the state statutes involved, and consequently, the defendants' demand for the convening of a three-judge court was denied.

The plaintiffs demand that a permanent injunction issue herein in the form and substance of the preliminary injunction previously issued. This preliminary injunction read as follows:

> "It is, therefore, ordered, adjudged and decreed that pending further order of this Court, the Congress of Racial Equality and John Doe and Mary Doe, and each of them, and their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be and they are hereby restrained and enjoined from continuing to sponsor, finance or encourage unlawful picketing in the City of Baton Rouge, from engaging or participating in any unlawful congregating or marching in the streets or other public ways of the City of Baton Rouge, Louisiana, from conspiring, encouraging or participating in any boycott in restraint of trade, or from doing any other act designed to provoke breaches of the peace or from doing any act in violation of the provisions of LSA-R.S. 14:59, LSA R.S. 63.4, LSA-R.S. 14:92, LSA-R.S. 14:100.1, LSA-R.S. 14:103, and LSA-R.S. 14:103.1, as well as Title 42 U.S.C. Section 1985, and Title 15 U.S.C. Section 1, et seq."

The Louisiana Statutes, the violations of which were preliminarily enjoined, are criminal in nature and deal principally with prohibitions against (1) remaining upon the property or the business establishment of another after being requested by the owner thereof to leave; (2) inciting, urging or encouraging others to remain upon the property or premises of another, knowing that such person has been forbidden to go or to remain there; (3) enticing or aiding anyone under seventeen years of age to trespass or to violate any law or ordinance of

the state, city, or parish; (4) obstructing free, convenient and normal use of the public streets, highways, sidewalks, etc., or restraining traffic or passage thereon; (5) disturbing the peace by using unnecessarily loud, offensive or insulting language or engaging in any act in a violent or tumultous manner by three or more persons or holding unlawful assemblies such as to unreasonably disturb or alarm the public; (6) preventing or seeking to prevent or interfering or seeking to interfere with the owner or operator of a place of business in the lawful pursuit of his business with his customers, or interfering with other persons who are expressly or impliedly invited upon said premises in the normal course of operating such business.

The Federal Statute, the violation of which was preliminarily enjoined, is Title 42 U.S.C.A. §1985(3), which reads, in pertinent part, as follows:

> "If two or more persons in any State or Territory conspire * * * for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do * * * any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators."

The defendants were also enjoined in the preliminary injunction from further violation of the provisions of Title 15 U.S.C.A. §1 et seq., but since the Court has determined that the alleged violations of that Section of the Federal Statutes is not pertinent to this matter, that Section will not be quoted.

The defendants allege not that these Statutes are unconstitutional in themselves, but that their enforcement against and the application to the particular activities in which the defendants were engaged on December 11 through December 15, 1961, deprives them of their right to freedom of speech and freedom to assemble as guaranteed by the First Amendment to the United States Constitution, and also deprives defendants of their "rights, privileges, and immunities under the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution." The defendants contend that they have a constitutionally guaranteed right to assemble, speak, and protest against the "State and local racial segregation laws, customs and usages of the City of Baton Rouge, Louisiana." They do not allege that the above-quoted statutes are unconstitutional, but they merely say that their activities on the days in question were "not criminal in nature" and were not "contemplated criminal activities," and that hence, the statutes in question were improperly applied and invoked by the plaintiffs against them. Hence, it is not the question of constitutionality of these statutes which is before this Court, but only the question of whether or not the enforcement of these statutes under the circumstances of this case deprived the defendants of their constitutional rights, and whether or not the defendants should be restrained and enjoined in the future from violating these statutes and from engaging in the other activities complained of by the plaintiffs.

[4] The First Amendment to the United States Constitution provides for freedom of religion and speech; freedom of the press; and the right to peaceably assemble and the right to petition the Government for a redress of grievances. This Amendment secured these rights against abridgment by the Federal Government. The same rights are secured to all persons against abridgment by the States by the Fourteenth Amendment to the United States Constitution. Schnei-

der v. State of New Jersey, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, 130 A.L.R. 1278.

[5] That the right of freedom of speech and freedom to peaceably assemble is a preferred right granted by the United States Constitution cannot be denied. However, these guaranteed rights are not without their limitations. These rights, while so guaranteed by the United States Constitution, are by no means absolute. They are subject to necessary and essential qualifications. For instance, these rights are subject to the elemental need for order, without which the guarantees of civil rights would be a mockery. Tribune Review Publishing Company v. Thomas, D.C., 153 F.Supp. 486, affirmed 3 Cir., 254 F.2d 883. It is a necessary ecrollary to these guaranteed rights that the granting of them cannot deprive the State of the power to enforce laws in the legitimate exercise of its police power. People v. Winters, 294 N.Y. 545, 63 N.E. 2d 98. The basic right to freedom of speech and freedom to peaceably assemble must, on occasions, be subordinated to other values and considerations. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, 342 U.S. 842, 72 S.Ct. 20, 96 L.Ed. 636 and, 355 U.S. 936, 78 S.Ct. 409, 2 L.Ed.2d 419; Poulos v. State of New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed.2d 1105, 30 A.L.R.2d 987.

[6-9] For example, the right of free speech does not carry with it the right to persuade or attempt to persuade others to violate the law. Bullock v. United States, 6 Cir., 265 F.2d 683; 360 U.S. 909, 79 S.Ct. 1294, 3 L.Ed. 1260; Kasper v. Brittain, 245 F.2d 92; 355 U.S. 834, 78 S.Ct. 54, 2 L.Ed.2d 46. Whether an utterance is privileged under the constitutional guarantee of freedom of speech must be determined only after considering the nature of the utterance in connection with the time, place, and manner of its making. United States v. Hartzel, 7 Cir., 138 F.2d 169. It cannot be denied that in the exercise of its police power, the State may restrict by statute the right to freedom of speech or assembly in the

interest of public safety. Harisiades v. Shaughnessy, D.C., 90 F.Supp. 397. If such statute or other regulatory measures are adopted by a state pursuant to its police powers, and these statutes are attacked as infringing upon the freedoms guaranteed by the United States Constitution, and Amendments thereto, the Court must attempt to balance the competing public and private interests at stake. Lathrop v. Donohue, 10 Wis.2d 230, 102 N.W.2d 404. A state or municipality may, in the exercise of its police power, curtail or regulate the right and freedom of expression or freedom to assemble, when it is reasonable to believe that the continued exercise of these otherwise constitutionally guaranteed rights present a clear and present danger to the functions of government itself. If there is a clear and present danger to government, or to interests which the state may lawfully protect, then the constitutionally guaranteed rights of freedom of speech and freedom to peaceably assemble are susceptible of restraint. However, to support a finding of clear and present danger, such as will justify the imposition of restraints on these constitutionally guaranteed rights, it must be shown that immediate serious violence was or is to be expected, or that past actions, events, or conduct will reasonably lead to the conclusion that such violence was contemplated or expected. For example, where a mob is obviously ripe for riot, and the mob leader gives the word to start, such an utterance is not protected by the United States Constitution. United States v. Dennis, 2 Cir., 183 F.2d 201, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. If the utterance or assembly is such as to incite people to violence or to threaten the security of community life, or to interfere with the orderly function of governmental authority, then such actions are not constitutionally protected. United States v. Schneiderman, D.C., 102 F.Supp. 87.

[10] A city ordinance or a state or federal statute prohibiting persons whose presence interfere with the free use of the streets and sidewalks from remaining thereon after being ordered to disperse by police officers is not unconstitu-

tional as tending to abridge freedom of speech or assembly. City of Tacoma v. Roe, 190 Wash. 444, 68 P.2d 1028.

The freedoms guaranteed by the United States Constitution and the Amendments thereto, and the civil rights accorded by the Statutes of the United States, are freedoms and rights guaranteed to *all* people, and not to a favored few. Experience teaches us, however, that it is seldom possible to accord to any one person or group of persons completely unlimited and unregulated freedoms, without thereby depriving others of all or part of the freedoms and rights to which they also are entitled by the very same laws. Thus, when there develops a dispute or controversy between conflicting claims to certain rights and freedoms, it is the function of the Court to attempt to so balance and distribute these rights as between the contending parties as to do the greatest good for the greatest number of people. In attempting to resolve these conflicting claims to civil rights, we must not view the dispute as a contest between the white and the Negro race. To do so is to appeal dangerously to emotions rather than to the law and common sense. The problem must, instead, be viewed simply as one whose solution is dependent upon an equitable apportionment of the guaranteed rights and freedoms in such a manner as to do substantial justice to *all* of the contending parties. To accomplish this end, these rights must be so apportioned between all citizens as to create as near as possible an equitable balance between the rights and freedoms to which individuals are entitled, and the duties, obligations, and responsibilities necessarily attendant thereon. To deprive one group of citizens of their right to unhampered use of the public streets, highways and sidewalks, to deprive them of unrestricted ingress and egress to public or private buildings, to deprive them of the right to have available, if needed, adequate police protection, to deprive the storekeeper of his right to trade with customers of his own choice and to otherwise conduct his business as he sees fit, to allow interference with the orderly functions of government

and to permit disobedience of orders emanating from properly constituted police and governmental authorities in the lawful exercise of their official functions, all in order to give to another group of citizens the right to assemble or to speak in an unrestricted manner, would certainly fall far short of balancing these fundamental rights so as to do substantial justice to all persons involved. It is imperative, if law and order are to be maintained, and if orderly government is to continue to function, that the rights of *all* citizens, regardless of race, color, or creed, be respected and protected to the greatest extent possible.

To look with favor upon members of one segment of society advocating and encouraging their members to trespass and encroach upon the property of others and to "sit in" on the premises of private business establishments, and to refuse to remove themselves therefrom even if requested by the owner or tenant thereof to do so, is to completely ignore the very same right of freedom of choice that should be accorded the storekeeper that the defendants would now have the Court grant to them. The right to freedom of choice and freedom of association should be just as sacred to one segment of society as it is to another. The right of one segment of society to use the public streets and sidewalks at all times must be balanced as nearly as possible with the same right of others to use the same facilities. The right to freely speak and to freely assemble in a peaceful manner must be accorded and protected in such a way as to maintain, at the same time, the rights of others to enjoy a peaceful existence in their community. Certainly the fact that some 2,000 people wish to hold a "rally" and to peacefully demonstrate in support of a cause, may be consistent with the orderly function of government and may not unduly interfere with the basic constitutional rights of others. However, when such a rally reaches the stage of becoming a mob, under the direction of a leader who refuses to heed police orders and instructions, and when such leader openly advocates to

the mob, who are apparently willing to obey his every command or suggestion, that they violate existing State laws by entering upon and remaining upon the private property of others, even though they are requested by the owner or tenant to remove themselves therefrom, this sort of "rally" is no longer compatible with orderly government. The same right to due process and equal protection of the laws is accorded by the United States Constitution, and the Amendments thereto, to the shopkeeper, the policeman, the public official, and the members of the Caucasian race as is, of late, so loudly proclaimed to be the right of the Negro. These rights can be protected only so long as the recipient thereof is cognizant of the responsibilities and duties that necessarily accompany the exercise of these rights and freedoms.

It has been urged by the defendants that injunctive relief should not be available to the plaintiff because by resort to the process of arrest, the plaintiff had a remedy at law if state statutes were, in fact, being violated. Of course, the fallacy in this contention is the fact that it was the arrest of twenty-three Negroes for allegedly violating the statutes in question that was the precipitating cause of the demonstrations complained of. Additional arrests could be reasonably calculated to have created additional causes for demonstration.

[11, 12] There can be no question but what injunctive relief may be had even though the acts complained of were violations of criminal statutes. Milliken v. Stone, D.C., 7 F.2d 397; International Union of Mine, Mill, and Smelter Workers v. Tennessee Copper Co., D.C., 31 F. Supp. 1015; 43 C.J.S. Injunctions § 152, page 764. This Court is of the opinion that there was no improper application or enforcement of the State Statutes in question. The application of these Statutes under the circumstances of this case constituted the necessary and proper exercise of the police powers inherent in the officials of the City of Baton Rouge, the Parish of East Baton Rouge, and the State of Louisiana. Therefore, this Court is

of the opinion that the defendants may properly be enjoined and restrained to whatever extent may be necessary, from further interference with the duties of the city, Parish, and State officials in the enforcement of those statutes and from further interference with those officials in the exercise of their official duties. Furthermore, this Court also concludes that the defendants were in violation of the provisions of Title 42 U.S.C.A. § 1985(3), and that the plaintiffs are entitled to injunctive relief in connection with those violations. Brewer v. Hoxie School District No. 46, 8 Cir., 238 F.2d 91. The plaintiffs, in the instant case, were public officials who, by their constitutionally imposed duty and by their oath of office, were obligated to support and defend the United States Constitution and the Fourteenth Amendment thereto, and to accord equal protection of the law to all persons, and as such, must be deemed to have a right, which is a federal right, to be free from either direct or indirect interference in the performance of that duty. As the facts in this case clearly show, because of the activities of the defendants, and those acting in concert with the defendants, certain streets, ways, and sidewalks were blocked and obstructed, contrary to the laws of the State of Louisiana, and the ingress and egress to certain buildings, both public and private, were completely blocked insofar as other citizens were concerned. Furthermore, the very fact that the defendants, together with those acting in concert with them, created an obviously dangerous situation, and made it necessary for the entire police force to be utilized in order to preserve the tranquillity of the community and to cope with pending dangers, created a situation whereby there were virtually no police officers or police protection available to the citizens in the other areas of the City of Baton Rouge and the Parish of East Baton Rouge, Louisiana. These citizens in the other locations of the city and Parish were entitled to have available necessary police protection in the event such was needed, and the plaintiffs, as officials of the city and Parish, were under an absolute duty to provide these protections to all citizens. In the Brewer

case, the Court considered the question of the issuance of an injunction in connection with the alleged violations of Title 42 U.S.C.A. § 1985(3), and stated that the right of the Federal Court to issue an injunction to protect rights safeguarded by the Constitution and Laws of the United States is well established. The Court said:

> "An injunction will issue whenever necessary 'to afford adequate protection of constitutional rights,' • • •. Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available. • • •
>
> "The plaintiffs being bound by constitutionally imposed duty and their oaths of office to support the Fourteenth Amendment and to accord equal protection of the laws to all persons in their operation of the Hoxie Schools must be deemed to have a right, which is a federal right, to be free from direct interference in the performance of that duty. • • •
>
> "Plaintiffs are under a duty to obey the Constitution. Const. Art. VI, c. 2. They are bound by oath or affirmation to support it and are mindful of their obligation. It follows as a necessary corollary that they have a federal right to be free from direct and deliberate interference with the performace of constitutionally imposed duty. The right arises by necessary implication from the imposition of the duty as clearly as though it had been specifically stated in the Constitution. • • •
>
> "In the case at bar we think there is no question that plaintiff school board members may be protected by a federal injunction in their efforts to discharge their duty under the Fourteenth Amendment."

The Court further held in the Brewer case that there was sufficient proximity between the members of the school board and the children whose constitutional rights were allegedly impaired, to allow injunctive relief to run directly to and in favor of the members of the school board in order that they might thereby protect the rights of the children for whom they were responsible. The Court said:

> "The right does not arise solely from the interest of the parties concerned, but from the necessity of government itself. * * * Though, generally speaking, the right to equal protection is a personal right of individuals, this is only 'a rule of practice', * * * which will not be followed where the identity of interests between the party asserting the right and the party in whose favor the right directly exists is sufficiently close."

The duty of the school board in the Brewer case was, in the opinion of this Court, no greater than was the duty of the plaintiffs in the instant case to make certain that they were, at all times, in a position to uphold the laws of the State, city and Parish, and to protect the community against interference with their constitutionally guaranteed rights. The provisions of 42 U.S.C.A. § 1985(3) very clearly make it a violation of federal law for two or more persons to act in concert for the purpose of depriving, either directly or indirectly, any person or class of persons, of the equal protection of the laws and the equal privileges and immunities under the law. Certainly this statute must be given equal application to all persons who are found to be in violation thereof. The fact that the demonstrators in the instant case did, in fact, deprive other citizens of the City of Baton Rouge and the Parish of East Baton Rouge of equal protection of the law and did, in fact, prevent and hinder the constituted authorities of the State of Louisiana and of the Parish of East Baton Rouge and of the City of Baton Rouge from giving or securing to all persons within the city and Parish the equal protection of the laws, consti-

tuted a violation of Title 42 U.S.C.A. § 1985(3), the future violations of which should certainly be enjoined.

[13] Since this Court has come to the inescapable conclusion that under the circumstances of this case, the plaintiffs are entitled to some measure of injunctive relief, it remains to be determined the nature and extent of the relief indicated. A request for injunctive relief is an appeal to the equity jurisdiction of the Court, and is an appeal to the sound discretion which guides the determinations of courts of equity. In Hecht Company v. Bowles, 321 U.S. 321, 64 S.Ct. 587, 88 L. Ed. 754, the Court said:

> "The historic injunctive process was designed to deter; not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity, has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

[14] Thus, the nature of the case, the probability of future violations, the probable extent of future damage reasonably to be anticipated, and the extent of the impairment of the defendants' constitutionally guaranteed rights as balanced against the rights to be accorded to the plaintiffs, are all factors to be considered in determining the extent of the relief granted.

[15] This Court shall make permanent its preliminary injunction insofar as it enjoins the defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from financing, sponsoring, encouraging, or engaging in meetings or any other activities whereby violations of existing State or

Federal laws are suggested, advocated, or encouraged; from financing, sponsoring, encouraging, or engaging in meetings whereby the public ways, streets, sidewalks, or highways, of the City of Baton Rouge, or the Parish of East Baton Rouge, are blocked, or the unimpaired use thereof denied to other traffic; from financing, sponsoring, encouraging, or engaging in meetings or any other activities wherein or whereby disobedience to the lawful orders of properly constituted law enforcing agencies and their personnel is advocated, suggested or encouraged; from financing, sponsoring, encouraging, or engaging in meetings or any other activities designed or held for the purpose of impeding or obstructing the administration of justice or the orderly functions of government; and from financing, sponsoring, or encouraging, or engaging in any activities designed to, or which do, impede, hinder, or obstruct officers of the law, or officials of the Parish of East Baton Rouge, or the City of Baton Rouge, from performing and discharging the duties of their respective offices.

The demands for injunctive relief contained in the defendants' counterclaim are denied.

A decree in accordance herewith shall be prepared and submitted.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19,703

D. C. Docket No. 624 Misc. B. R. Div.

CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,

Appellants,

versus

BRYAN CLEMMONS, WINGATE WHITE and JOHN CHRISTIAN, the latter in his official capacity as Mayor-President of the City of Baton Rouge, Louisiana.

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before Tuttle, Chief Judge, and Wisdom and Gewin, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same

is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to dissolve the injunction and to dismiss the complaint forthwith;

It is further ordered and adjudged that the appellees, Bryan Clemmons, Wingate White and John Christian, the latter in his official capacity as Mayor-President of the City of Bator Rouge, Louisiana, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Gewin, Circuit Judge, concurs specially."

September 12, 1963

Issued as Mandate:

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19703

CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,

Appellants,

versus

BRYAN CLEMMONS, WINGATE WHITE and JOHN CHRISTIAN, the latter in his official capacity as Mayor-President of the City of Baton Rouge, Louisiana.

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(October 18, 1963)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, WISDOM, and GEWIN, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing in the above entitled and numbered cause is hereby DENIED.

APPENDIX E

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19703

CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,

Appellants,

versus

BRYAN CLEMMONS, WINGATE WHITE and JOHN CHRISTIAN, the latter in his official capacity as Mayor-President of the City of Baton Rouge, Louisiana.

Appellees.

ON CONSIDERATION OF THE APPLICATION of the Appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expira-

tion of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 31st day of October, 1963.

[s] JOHN MINOR WISDOM
United States Circuit Judge

(ORIGINAL FILED—OCTOBER 31, 1963)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 648

BRYAN CLEMMONS, WINGATE WHITE and JOHN CHRISTIAN,

The Latter in His Official Capacity as Mayor-President of the City of Baton Rouge, Louisiana,

Petitioners,

versus

CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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WESTER SWEET.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ____

BRYAN CLEMMONS, WINGATE WHITE and JOHN CHRISTIAN,
The Latter in His Official Capacity as Mayor-President of the City of Baton Rouge, Louisiana,

Petitioners,

versus

CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In this case* the Court is being called upon to render an academic dissertation, for no resolution of the questions

*This case is closely related to *Moore* v. *Louisiana*, in which a petition for certiorari has been filed in this Court, and *Cox* v. *Louisiana*, on appeal to this Court from the Supreme Court of Louisiana.

presented for review could alter the result reached in the Court of Appeals.

In directing dissolution of the injunction and dismissal of the complaint, the Court of Appeals made it abundantly explicit that its action was predicated upon three separate grounds:

> ". . . (1) the plaintiffs have failed to state or to show that the defendants conspired *purposefully* to deprive others of equal protection of the laws, as required by Section 1985(3); (2) there is no federal right in the city officials, individually or on behalf of the Baton Rouge citizenry, to be protected in the performance of their municipal duties, as 28 U. S. C. A. 1331 requires of an action arising under the Constitution and laws of the United States; and (3) there is no state action here such as is necessary to support a suit invoking the Fourteenth Amendment and statutes enacted to enforce that amendment." (Italics supplied by the Court of Appeals.) (Petition, page 38.)

The questions presented by the petition relate solely to what the Court of Appeals termed the "third fatal weakness in the plaintiffs' case"—the issue of "state action." No questions with respect to the first and second fatal weaknesses are presented for review. Thus, the petition does not urge that the Court of Appeals was in error in holding that the only conspiracies proscribed by Section 1985(3) are those having as their *purpose* depriving persons of Fourteenth Amendment rights. Nor do petitioners

now claim that such a purpose can be imputed to a demonstration, having as its object the securing of equal protection of the laws for all simply because the demonstration results in temporarily blocking traffic or reducing police protection in other parts of the city. Such a contention, the Court of Appeals aptly and acutely commented, "has the earmarks of a bad pun." This Court has not been asked to reverse with respect to the issue of "purpose" nor with respect to the issue of the federal interest in avoiding traffic interruptions and diminished police protection, although each of these is sufficient, by itself, to sustain the result below.

While not claiming that the Court of Appeals was without power to decide, on its own motion, whether there was a valid federal claim underlying the federal injunction, the petition seems to contend that there was something improper in the Court's having done so. Faced with the question of whether it should uphold an injunction imposing prior restraints upon the exercise of Constitutional rights to freedom of speech and assembly, it was patently not erroneous for the Court of Appeals to conclude:

> "In the circumstances, a proper regard for the federal system requires that the Court scrutinize closely the question of jurisdiction and whether on the merits the case is indeed one arising under the Constitution and laws of the United States." (*Id.* at 24.)

It was clearly correct for the Court of Appeals to direct that the injunction be dissolved and the complaint dismissed.

The questions presented for review would not alter this disposition. The petition, accordingly, should be denied.

Respectfully submitted,

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